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No. 06-1478

In the Supreme Court of the United States

JACK E. ALDERMAN,

Petitioner,

v.

HILTON HALL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

For the most part, Respondent's Opposition brief does not require a reply because it ignores virtually all of Petitioner's points. Respondent largely regurgitates both the procedural history of this case and the Eleventh Circuit's opinion below. Petitioner, therefore, submits this short reply only to correct a grievous misstatement made by Respondent.

Respondent claims that Petitioner seeks to place a new burden on trial counsel to justify the reasonableness of their sentencing phase investigation and strategy. That is wrong.

Petitioner merely seeks to hold trial counsel to the standard this Court articulated in *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984): "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Counsel admitted that he made no strategic decision to limit his mitigation investigation; instead, he mistakenly believed that the law did not permit him to offer life-history evidence beyond that of Petitioner's character in mitigation. This admission, combined with the voluminous mitigating evidence that we now know counsel could have offered, demonstrates conclusively that counsel's investigation was not reasonable.

While the Eleventh Circuit acknowledged *Strickland*, the court adopted a standard that eviscerated it. Instead of asking whether counsel conducted a reasonable mitigation investigation, the court asked Mr. Alderman to prove that professionally competent counsel would not have adopted trial counsel's innocence (or residual doubt) strategy at the resentencing trial. *Alderman v. Terry*, 468 F.3d 775, 792 (2006) (citing *Harich v. Dugger*, 844 F.2d 1464, 1470 (11th Cir. 1988) (overruled on other grounds)).

The difference between the *Strickland* and Eleventh Circuit standards is significant. The former is a reasonableness standard that attempts to ensure that criminal defendants receive the effective assistance of counsel guaranteed by the Sixth Amendment without "requir[ing] counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). The latter abandons this purpose and asks generally whether competent counsel would have adopted the same resentencing trial strategy. The problem is that the answer to this question does not yield any information probative of the Sixth Amendment inquiry. It is entirely possible that competent counsel would have adopted the very same trial strategy as counsel at issue, but would not have limited his mitigation investigation in the same way.

Indeed, this case reveals the constitutional problem with the Eleventh Circuit's standard. While no one is questioning trial counsel's innocence strategy here, the prevailing professional norms demonstrate that competent counsel would not have limited his mitigation investigation the way trial counsel did here. The applicable professional standards require trial counsel to investigate a capital defendant's background for "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93, 11.8.6, p. 133 (1989)); *see also* 1 ABA Standards for Criminal Justice 4-4.1, commentary, pp. 4-55 (2d ed. 1980). This Court has held that counsel who did not adhere to these prevailing professional norms violated a capital defendant's Sixth Amendment rights. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel's failure to introduce voluminous mitigating evidence was not justified by a tactical decision because counsel did not adequately investigate and therefore

did not know what the evidence was); *accord Wiggins*, 539 U.S. at 522; *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

CONCLUSION

The Eleventh Circuit's decision is contrary to *Strickland* and undermines a long line of significant decisions by this Court. Certiorari is warranted to bring the Eleventh Circuit back in line with the clearly established federal law as determined by this Court.

Respectfully Submitted,

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